No. 04-681

IN THE

Supreme Court of the United States

CORA F. LINDQUIST, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF JAMES O. LINDQUIST,

Petitioner,

v.

BUCKINGHAM TOWNSHIP AND THE BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On March 10, 2000, James and Cora Lindquist filed their original Complaint in the United States District Court for the Eastern District of Pennsylvania against various parties, including Buckingham Township and its Board of Supervisors, invoking 42 U.S.C.§ 1983 and claiming a violation of their procedural and due process rights, civil conspiracy and a regulatory taking. The Lindquists filed an Amended Complaint on May 24, 2000. Thereafter, the Lindquists filed their first Motion for Leave to File a Second Amended Complaint on June 5, 2000 which was denied as moot on June 22, 2000. On March 13, 2001, Appellants filed a second Motion for Leave to File a Second Amended Complaint to add the Lindquist children and SKSM Associates as Plaintiffs. SKSM was a general partnership engaged by the Lindquists to provide services during the land development process. The District Court denied that Motion on March 30, 2001. Finally, on December 21, 2001, after discovery was closed and after the District Court had disposed of multiple motions for summary judgment, including the Township's, the Lindquists filed a third Motion to Amend the Amended Complaint to add a cause of action for alleged violation of their equal protection rights. The District Court denied that Motion on June 13, 2002. The Order closely followed a remand of the case from the Third Circuit after an appeal to that Court by another Defendant had been withdrawn.

In denying the Lindquists' third Motion to Amend, the District Court rejected the Lindquists' argument that they had been thwarted in their attempts to secure public docu-

ments relating to another subdivision and land development project in the Township known as "Yerkes". The Lindquists claimed that the Yerkes documents served as the basis for their equal protection claim, asserting that they would show that the Yerkes' development was treated differently than the Lindquists' development by the Township. In response, the Township established that, during a very extensive discovery period set by the District Court, counsel for another Defendant had requested the subdivision and land development records relating to the Yerkes' development. The Township Defendants complied with the request by producing voluminous records for review and copying. In the summer of 2001, counsel for Defendant George Bush, the Township's former solicitor, reviewed the documents in defense counsel's office and requested the first page of each of the meeting minutes relating to the Yerkes subdivision. An invitation was extended to the Lindquists' counsel to review the same records in defense counsel's office. Lindquists' counsel chose not to accept that invitation for reasons she has never disclosed. In addition, the records were always available for review at the Township Building because they were public records. Petitioners' counsel simply failed to avail herself of the opportunity to review the records at the Township building until after the discovery deadline had been completed.

The facts of this case are voluminous and complicated, but the salient facts are succinctly set forth in the District Court's Findings of Fact (Appendix, 51a). Following a non-jury trial in September 2002 and the post-trial submission of proposed Findings of Fact and Conclusions of Law by the parties, the District Court entered Judgment in favor of the Township

Defendants (Appendix, 72a) and against the Lindquists after making Findings of Fact and Conclusions of Law (Appendix, 51a). The United States Court of Appeals for the Third Circuit affirmed the District Court's Judgment.

REASONS FOR DENYING THE PETITION

The Lindquists' Petition is based upon the premise that there is a split of authority in the Circuit Courts as to the standard for establishing a violation of substantive due process in municipal land use decisions. By advancing that premise, Petitioners necessarily argue that the Supreme Court has not yet applied the "shocks the conscience" standard in such cases. Respondents respectfully suggest that the Petitioners are mistaken in this argument.

I. THE "SHOCKS THE CONSCIENCE" STANDARD HAS BEEN APPLIED BY THIS COURT TO A SUBSTANTIVE DUE PROCESS CASE INVOLVING MUNICIPAL LAND USE DECISIONS

A review of the analyses and decisions in *County of Sacramento v. Lewis,* 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) and *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 123 S.Ct. 1389, 155 L. Ed.2d 349 (2003) demonstrates that the Court was not limiting its holding in *Lewis* to cases in which a law enforcement officer is accused of violating the substantive due process of a criminal suspect in a pursuit case. While a police chase was the factual background in that case for the Court's decision, and there was then a split of authority between several

Circuits on the standard involved in police pursuit cases ("deliberate indifference" or "reckless disregard" versus "shocks the conscience"), the Court apparently approached the case as an opportunity to re-articulate a standard which it had been using for over half a century in substantive due process cases involving executive action by government.

The core of the concept of due process is "protection against arbitrary action". *County of Sacramento v. Lewis*, 523 U.S. at 845. "Our cases dealing with abusive, executive action have repeatedly emphasized that only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense' . . . ." *Id.*, at 846, citing *Collins v. Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061, 1071, 117 L.Ed.2d 261 (1992). The Court noted that "in *Collins v. Harker Heights*, for example, we said that the Due Process Clause was intended to prevent government officials " ' "from abusing [their] power, or employing it as an instrument of oppression." ' " 503 U.S. at 126, 112 S.Ct. at 1069 (quoting *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 at 196, 109 S.Ct. 998, at 1003, 103 L. Ed. 2d 249 (1989) (in turn, quoting *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S.Ct. 668, 670-671, 88 L. Ed. 2d 677 (1986))." *County of Sacramento v. Lewis*, 523 U.S. at 846. Turning to an analysis of what constitutes arbitrary action, the Court noted that it first described such action as conduct that " 'shocks the conscience' and violates the 'decencies of civilized conduct.' " *County of Sacramento v. Lewis*, 523 U.S. at 846, citing *Rochin v. California*, 342 U.S. 165, 172-173, 72 S.Ct. 205, 209-210, 96 L.Ed. 183 (1952) (forced pumping of suspect's stomach was enough to violate sub-

stantive due process). Referring again to *Collins v. Harker Heights*, 503 U.S. at 128, 112 S.Ct. at 1070, the Court stated that "we said again that the substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.' " *County of Sacramento v. Lewis*, 523 U.S. at 847.

In addition to describing arbitrary executive action as only that conduct which "shocks the conscience", the Court also made clear its application of that standard to all substantive due process cases in which executive action is the basis for the due process claim by reference to an earlier decision:

> The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. *Betts v. Brady*, 316 U.S. 455, 462, 62 S.Ct. 1252, 1256, 86 L.Ed. 1595 (1942).

County of Sacramento v. Lewis, 523 U.S. at 850. The exact analysis of the circumstances of each substantive due process cases demanded by the Court to determine if the government's action rises to the level of "arbitrary" or "conscience shocking" certainly opened the door for this standard to be

applied to substantive due process claims involving executive action in land use cases.

Indeed, in *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 123 S.Ct. 1389, 155 L.Ed.2d 349 (2003), the Court applied its standard of arbitrary action (action so egregious that it "shocks the conscience") to a land use case in which a municipality's engineer refused to issue building permits and the municipality submitted its administrative land use determination to a referendum pursuant to its charter. In that case, plaintiff claimed that those two actions violated the plaintiff's substantive due process rights. This Court found no merit to the claim. Referring to the municipal engineer's refusal to issue building permits, the Court analyzed the substantive due process claim, referencing its earlier decision in *County of Sacramento v. Lewis*, *supra*, as follows:

> We need not decide whether respondents possessed a property interest in the building permits, because the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct. See *County of Sacramento v. Lewis* [citations omitted]. (noting that in our evaluations of "abusive executive action", we have held that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense' ").

City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., *supra*, 538 U.S. at 198, 123 S.Ct. at 1396.

The Petitioners' analysis of *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., supra*, clearly misses the mark (Petition for Writ of Certiorari, p.26). Petitioners apparently argue that because the Court did not use the terminology "shocks the conscience", it was not applying its charactization of "arbitrary conduct" previously set forth in *County of Sacramento v. Lewis, supra* to the actions of the municipality in *City of Cuyahoga Falls,* a land use case. Petitioners' analysis is, at best, a misreading of those two decisions. Official government misconduct which rises to the level of a substantive due process violation is "arbitrary" in the constitutional sense and is the functional equivalent of conduct which is so egregious that it shocks the conscience.

II. WITH ONE EXCEPTION, THERE IS NO SPLIT OF AUTHORITY IN THE CIRCUIT COURTS AS TO THE STANDARD NECESSARY TO ESTABLISH A VIOLATION OF SUBSTANTIVE DUE PROCESS IN LAND USE CASES

The Lindquists concede in their Petition that the First, Second, Third, Sixth, Eighth and Tenth Circuits follow the "shocks the conscience" standard set forth in *County of Sacramento v. Lewis, supra*, and adopted by the Third Circuit in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, et al., 316 F.3d 392 (3d Cir. 2003). Although Petitioners claim that the Fifth Circuit applies a rational basis test, they cite no case to support that contention. Respondents respectfully suggest that, with the possible exception of the Seventh

Circuit, Petitioners are mistaken in their analysis of where the remaining Circuits fall on this issue.

A.. District of Columbia Circuit

The Lindquists cite to the case of *George Washington University v. District of Columbia*, 318 F.3d 203 (2003) and claim that the District of Columbia Circuit employs a different standard than the Third Circuit. There, the District of Columbia Circuit described its standard in such substantive due process cases in a manner closely analogous to the "shocks the conscience" standard:

> Once a property interest is found, however, the doctrine of substantive due process constrains only egregious government misconduct. We have described the doctrine as preventing only "grave unfairness," *Silverman v. Barry*, 269 U.S.App. D.C. 327, 845 F.2d 1072, 1080 (D.C. Cir. 1988), and identified two ways in which such unfairness might be shown: "Only [1] a substantial infringement of state law prompted by personal or group animus, or [2] a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under §1983." *Id. See also Tri-County Industries v. District of Columbia*, 322 U.S.App. D.C. 412, 104 F.3d 455, 459-60 (D.C. Cir. 1997); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 465-67 (7th Cir. 1988), (noting the "uncanalized discretion" inherent in substantive due process review and thus, given the otherwise resulting federal judicial intrusions on state and legislative authority, the need to limit its role to

> islative authority, the need to limit its role to extreme cases).

George Washington University v. District of Columbia, *supra* at 209.

Without using the words "shocks the conscience", the language of that case refers to egregious government misconduct which is one of the phrases used by the Supreme Court in *County of Sacramento v. Lewis*, *supra*, to describe "arbitrary" action which violates substantive due process. Therefore, Respondents respectfully suggest that Petitioners misread this case.

The later case of *Yates v. District of Columbia*, 324 F.3d 724 (D.C. Cir. 2003) clearly followed *County of Sacramento v. Lewis*, *supra* and *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, *supra*. In *Yates*, the Plaintiff claimed a property interest in continued employment in a school district. The Circuit Court, questioning whether he actually had a property interest, stated:

> But even if he did, he suffered no deprivation of substantive due process. "[O]nly the most egregious official conduct" rises to the level of a substantive due process violation. [citing *County of Sacramento v. Lewis*, *supra*, *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, *supra*; *Tri-County Industries, Inc. v. District of Columbia*, *supra*, *Silverman v. Barry*, *supra*].

Yates v. District of Columbia, *supra*, at 725, 726.

Besides following *Lewis* and *Cuyahoga Falls* in two "property" cases, the District of Columbia Circuit's decisions recognized that the Supreme Court intended the "shocks the conscience" standard to be applied in cases other than police pursuits.

B. Fourth Circuit

Petitioners cite *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (2002) for the proposition that the Fourth Circuit applies a rational basis test; i.e., if the actions of the government are not rationally related to a legitimate government purpose, those actions violate substantive due process. In that case, however, the Fourth Circuit, in addressing the plaintiff's substantive due process claim against the governmental defendants for failure to issue a building permit for a proposed asphalt plant, stated as follows:

> In order to validly state such a claim, [plaintiff] must demonstrate: "(1) that [it] had property or a property interest; (2) that the state deprived [it] of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency." *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995). See also, *Front Royal & Warren County Indust. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 287-88 (4th Cir. 1998). Substantive due process protections "run only to state action so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapa-

> ble of avoidance by any pre-deprivation procedural protections or of adequate retification by any post-deprivation remedies. *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991).

Tri-County Paving, Inc. v. Ashe County, *supra*, at 440. While the Fourth Circuit does not use the terminology "shocks the conscience", it describes "arbitrary" conduct in terms of conduct "so far beyond the outer limits of legitimate governmental action", "irrational" and "so unjustified by any circumstance or government interest", that such a description borders upon, and may well equate to, the "egregious" conduct described by the Court in *County of Sacramento v. Lewis*, *supra*, which constitutes a violation of substantive due process.

C. Ninth Circuit

Petitioners cite to the case of *Squaw Valley Development Company v. Goldberg*, 375 F.3d 936 (9th Cir. 2004) and correctly point out that the Ninth Circuit held that the Fifth Amendment Takings Clause preempts substantive due process claims for deprivation of property. In doing so, however, the Ninth Circuit preliminarily addressed the law of substantive due process claims and quoted *County of Sacramento v. Lewis*, *supra*, for the proposition that "the touchstone of due process is protection of the individual against arbitrary action of government." *Squaw Valley Development Company v. Goldberg*, *supra* at 948 citing *County of Sacramento v. Lewis*, 523 U.S. at 845. It further stated, in its opinion, that "the substantive component of the Due Process Clause 'forbids the government from depriving a person of life, liberty,

or property in such a way that "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." ' *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998) (quoting *United States v. Salerno*, 481 U.S. 739, 746, 95 L.Ed.2d 697, 107 S.Ct. 2095 (1987)); *Daniels v. Williams*, 474 U.S. 327, 331, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986) (explaining that substantive due process protects against government power arbitrarily and oppressively exercised)." *Squaw Valley Development Company v. Goldberg*, *supra* at 948.

Thus, it is apparent that the Ninth Circuit follows the Supreme Court's substantive due process analysis as set forth in *County of Sacramento v. Lewis, supra.* That Circuit is different from the Third Circuit in its holding that the Fifth Amendment Takings Clause preempts substantive due process in cases alleging a deprivation of property rights. However, the Ninth Circuit applies the "shocks the conscience" standard to substantive due process cases involving executive action by government. Thus, there is no split of authority as to the standard applied.

D. Eleventh Circuit

Petitioners also cite *Greenbriar Village, L.L.C. v. City of Mountain Brook*, 345 F.3d 1258 (11th Cir. 2003) but not to support their argument of a split in authority on the standard to be applied in substantive due process cases. Rather, like the *Squaw Valley Development Corporation v. Goldberg* case, *supra*, Petitioners cite it only to demonstrate that the Eleventh Circuit holds that property rights created by state law are not "fundamental rights" created by the Constitution

and are thus not subject to due process protection. Therefore, as with the *Squaw Valley* case, this decision does not reflect a split from the Third Circuit's position on the standard to be applied in a substantive due process case.

E. Seventh Circuit

The only case the Petitioners have cited which possibly supports its position that there is a split among the Circuits is the Seventh Circuit case of *Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988). Oddly enough, this case is cited by the District of Columbia Circuit in *George Washington University v. District of Columbia*, *supra*, which held that substantive due process constrains only egregious government misconduct. *Coniston* is the only case cited in which a Circuit Court clearly appears to follow a rational basis test in a substantive due process claim involving executive action in a land use case. However, it must be noted that *Coniston* pre-dates *County of Sacramento v. Lewis*, *supra*, by ten years and *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, *supra*, by fifteen years. It is likely that the Seventh Circuit will, in an appropriate case, follow the Supreme Court and the other Circuits in applying the "shocks the conscience" standard to a substantive due process claim in a land use case. Under these circumstances, Respondents respectfully suggest that the Court's time and resources would not be well spent in granting certiorari.

III. PETITIONERS' MOTION TO AMEND PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 15(a) WAS PROPERLY DENIED BY THE DISTRICT COURT AND PROPERLY AFFIRMED BY THE THIRD CIRCUIT

A denial of a motion to amend is within the discretion of the District Court and is sound if justified by undue delay or prejudice. *Foman v. Davis*, 371 U.S. 178 (1962); see also *Lake v. Arnold*, 232 F.3d 360 (3d Cir. 2000). Although the Lindquists do not highlight the following facts in their Petition, their Motion to Amend the Complaint on December 21, 2001 was the fourth time they had sought to amend their Complaint but the first time they attempted to add an equal protection claim. At that point in the litigation, the discovery deadline set by the District Court had passed. In addition, despite the Lindquists' assertions to the contrary, all of the documents relating to the other development which the Lindquists claimed served as a basis for the equal protection claim, had always been available for their inspection. First, the documents relating to the other land development, Yerkes, were public records and available to any person for examination at the Township Building. Also, the Township's counsel, at the request of another party, had assembled these documents in counsel's office and invited all counsel, including Lindquists', to inspect the documents and to select documents for copying. Lindquists' counsel chose not to accept the invitation to inspect those records.

Finally, case dispositive motions had already been filed and decided by the District Court when the Lindquists sought

leave to amend their Complaint. Under those circumstances, the District Court appropriately determined that there was no legitimate explanation for the undue delay in seeking leave to amend the Complaint. The undue delay without explanation, coupled with the facts that discovery had been closed in the case and case dispositive motions had already been decided, was sufficient to establish prejudice to the Township if the Motion to Amend had been granted.

Under the circumstances, the District Court's denial of the Motion to Amend and the Third Circuit's affirmance of that decision were entirely appropriate and in no way conflict with the relevant decisions of this Court.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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